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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Marc Radow

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EXAMINER

GROSSO, HARRY A

ART UNIT

PAPER NUMBER

3781

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/797,401	Applicant(s) RADOW, MARC	
	Examiner HARRY A. GROSSO	Art Unit 3781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 September 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,5,7,8,10,14-23 and 29-53 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 14-23,29-33,38,39 and 45-53 is/are allowed.
- 6) ☐ Claim(s) 1-3,5,7,8,10,34,40 and 41 is/are rejected.
- 7) ☐ Claim(s) 35-37 and 42-44 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 26 October 2006 and 20 September 2010 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The objection to the specification has been overcome by the amendment filed September 20, 2010. The objection has been withdrawn.

The objection to the drawings has been overcome by the amendment filed September 20, 2010. The objection has been withdrawn.

The rejection of claims 1-5, 7, 8 and 10-13 under 35 U.S.C. 112, first and second paragraphs, has been overcome by the amendment filed September 20, 2010. The rejection has been withdrawn.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-3, 5, 7, 8, 10, 34, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Phalin in view of Lyu et al (Lyu), both of record.

3. Regarding claim 1, Phalin discloses a receptacle (Figure 4) with an outer wall portion (52) having a bottom portion, a base portion (53) and a circular convex raised portion (55) extending upward toward the center of the receptacle; and the outer wall (52) extending upwardly to form a rim (51) forming an open receptacle. Phalin does not teach the dimensions of the raised portion. Lyu discloses a receptacle having with an outer wall portion (12) having a bottom portion, a base portion (Figures 1-2, column 2, lines 24-32), a circular raised portion (14). Lyu discloses the raised portion in the bottom

Art Unit: 3781

(Figure 1) extending a first distance to an upper position (H2) that would be about one-half inch for a receptacle having a diameter of about 3.5 inches and increases to other heights less than two inches as the receptacle diameter increases. The raised portion is substantially circular and has a diameter of about 3.0 inches for the receptacle having a diameter of about 3.5 inches and increases as the receptacle diameter increases. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of the raised portion having the dimensions as disclosed by Lyu in the receptacle disclosed by Phalin since Phalin does not teach the dimensions of the raised portion and it is known in the art to use the dimensions taught by Lyu for the raised portion. Phalin discloses the distance the outer wall extends upwardly is greater than the height of the recessed portion and the rim can form an opening with a maximum opening dimension greater than the height of the outer wall (column 1, lines 49-56, the 404X307 can).

4. Regarding claim 2, Phalin discloses the raised portion is a continuous closed surface.

5. Regarding claim 3, Phalin discloses the raised portion is substantially dome shaped.

6. Regarding claims 5, Lyu discloses the first distance to the top of the raised portion can be approximately three-quarter inch for a receptacle with a diameter of about 4.0 inches.

7. Regarding claim 7, Phalin discloses the outer wall portion extends substantially vertically.

Art Unit: 3781

8. Regarding claim 8, Phalin discloses a receptacle having a continuous outer wall portion around the substantially flat surface with diameters up to 4.25 inches (column 1, lines 49—56).

9. Regarding claim 10, in the receptacle of Phalin as modified by Lyu, the second distance is at least twice the first distance.

10. Regarding claim 34, in Phalin as modified by Lyu, the raised portion is capable of allowing a granular material to move under the force of gravity toward the substantially flat surface and the surrounding portion would be capable of supporting the granular material. The receptacle would be capable of receiving an open rim of a beverage container sized to fit within the receptacle.

11. Regarding claim 40, Phalin discloses a receptacle (Figure 4) with an outer wall portion (52) having a bottom portion, a base portion (53) and a raised dome portion (55) with a surrounding portion facing upward; and the outer wall (52) extending upwardly to form a rim (51) forming an open receptacle. Phalin does not teach the dimensions of the raised dome portion. Lyu discloses a receptacle having with an outer wall portion (12) having a bottom portion, a base portion (Figures 1-2, column 2, lines 24-32), a raised dome portion (14) Lyu discloses the raised dome portion in the bottom (Figure 1) extending a first distance to an upper position (H2) that would be about one-half inch for a receptacle having a diameter of about 3.5 inches and increases to other heights less than two inches as the receptacle diameter increases. The raised portion is substantially circular and has a diameter of about 3.0 inches for the receptacle having a diameter of about 3.5 inches and increases as the receptacle diameter increases. It would have

Art Unit: 3781

been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of the raised portion having the dimensions as disclosed by Lyu in the receptacle disclosed by Phalin since Phalin does not teach the dimensions of the raised portion and it is known in the art to use the dimensions taught by Lyu for the raised portion. Phalin discloses the distance the outer wall extends upwardly is greater than the height of the raised dome portion and the rim can form an opening with a maximum opening dimension greater than the height of the outer wall (column 1, lines 49-56).

12. The raised portion of Phalin as modified by Lyu is capable of allowing a granular material to move under the force of gravity toward the substantially flat surface and the surrounding portion would be capable of supporting the granular material. The receptacle would be capable of receiving an open rim of an item of drinkware sized to fit within the receptacle.

13. Regarding claim 41, Phalin discloses the surrounding portion is flat.

Allowable Subject Matter

14. Claims 14-23, 29-33, 38, 39 and 45-53 are allowed.

15. Claims 35-37 and 42-44 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

16. Applicant's arguments filed September 20, 2010 have been fully considered but they are not persuasive. Applicant argues that Phalin does not disclose or teach a

Art Unit: 3781

container with a diameter greater than its height and a domed bottom configuration since Phalin is aimed at producing a container having a height greater than its diameter. In response, Phalin identifies that it is known to in the art to produce a container similar to the Phalin container with a diameter greater than its height (a 404x 307 container, column 1, lines 46-60 of Phalin). Phalin addresses the tooling and process for making a can with a height greater than the diameter, however, the bottom profile is not identified as critical to the process of producing the can with a height greater than the diameter or as limited to cans with a height greater than the diameter. While Phalin does not specify the bottom configuration of the 404 x 307 container, there is nothing in Phalin to indicate the bottom configuration of Phalin is not or can not be used in the 404 x 307 container since that container is a similar multiple drawn container.

17. Applicant argues that if one were to combine Phalin and Lyu, one would not pick and choose different components, aspects and/or dimensional relationships of the Lyu bottom wall but, rather, one would replace the entire bottom of Phalin with the bottom wall of Lyu. In response, Phalin does not teach the dimensions of the raised portion and it would have been obvious to try the dimensions taught by Lyu for the raised portion since it represents one of a finite number of known predictable solutions to the configuration of the raised portion.

18. Applicant argues that, in the independent claims 1 and 21, raised (dome) portion of the instant application has two dimensions, a height (relative to the sidewall) and a fixed diameter that is not relative to the overall diameter while the Lyu bottom configuration has no relation to the sidewall height and the diameter of Lyu's dome

Art Unit: 3781

increases as the diameter of the container increases. In response, the instant application states the limitation of the raised (dome) portion having a height of about $\frac{1}{2}$ inch to less than two inches and a diameter of approximately two to four inches with the height of the sidewall being greater than the height of the raised portion. Phalin as modified by Lyu meets these limitations as discussed above with a receptacle having a dome height of about $\frac{1}{2}$ inch and a dome diameter of about 3.0 inches. There is nothing in the claims that ties the height of the raised portion to the sidewall height beyond the limitation of the sidewall height being greater than the height of the raised portion.

19. Applicant argues that a container with a six or seven inch diameter would have a dome diameter that exceeds four inches using the Lyu configuration. In response, the claims do not recite a receptacle having a six or seven inch diameter but only recite a diameter in excess of four inches and a receptacle with a diameter of 4.25 inches would have a dome diameter of approximately 3.0 to 3.6 inches using the Lyu configuration.

20. Application provides an argument regarding the rejection of claim 14. In response, claim 14 was allowed in the previous action.

21. In response to applicant's argument that Phalin as modified by Lyu does not disclose a receptacle for receiving granular material to be placed on an open rim of an item of drinkware or beverage container with the raised dome portion being configured to allow a granular material to move under the force of gravity from the raised portion toward the surrounding portion, with the surrounding portion being configured to support the granular material, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order

Art Unit: 3781

to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. The raised portion of Phalin as modified by Lyu is capable of allowing a granular material to move under the force of gravity toward the substantially flat surface and the surrounding portion would be capable of supporting the granular material. The receptacle would be capable of receiving an open rim of an item of drinkware or a beverage container sized to fit within the receptacle.

22. In response to applicant's argument that Lyu discloses a rounded and not a flat bottom surface and replacing the bottom of Phalin with the bottom of Lyu does not teach a flat surface, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

23. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a

Art Unit: 3781

reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Conclusion

24. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HARRY A. GROSSO whose telephone number is (571)272-4539. The examiner can normally be reached on Monday through Thursday from 7am to 4 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick can be reached on 571-272-4561. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3781

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Anthony Stashick/
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/H. A. G./
Examiner, Art Unit 3781